TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY, III, ETC., ET AL.,
PETITIONERS,

vs.

JOHN N. CURLETT, PRESIDENT, ET AL., INDIVIDUALLY AND CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

PETITION FOR CERTIORARI FILED MAY 15, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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WILLIAM J. MURRAY, III, ETC., ET AL.,
PETITIONERS,

vs.

JOHN N. CURLETT, PRESIDENT, ET AL., INDIVIDUALLY AND CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

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INDEX

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[fol. A]

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 1961

No. 90

WILLIAM J. MURRAY, III, INFANT, ETC., ET AL., Appellants,

v.

JOHN N. CURLETT, ET AL.,

and

BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,
Appellees.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY

(J. GILBERT PRENDERGAST, Judge)

Appellants' Appendix—Filed August 5, 1961

[fol. ii]

INDEX TO APPENDIX

[fol. 1]

IN THE SUPERIOR COURT OF BALTIMORE CITY,
STATE OF MARYLAND

DOCKET ENTRIES AND JUDGMENT

Dec. 7, 1960—Petition for Writ of Mandamus and Affidavit filed.

Writ of Summons issued.

Jan. 16, 1961—Appearance of Harrison L. Winter, Esq., Ambrose T. Hartman, Esq. and Philip Z. Altfeld, Esq. for defendants. Same day Demurrer to Petition for Writ of Mandamus filed.

Jan. 23, 1961—Petition of Harold Buchman, Esq. to strike his appearance for Plaintiffs and Order of Court granting same filed.

Jan. 31, 1961—Plaintiffs' Request for hearing on Demurrer filed.

Mar. 2, 1961—Demurrer held Sub Curia (Prendergast, Judge).

Apr. 27, 1961—Defendants' Demurrer to Petition for Writ of Mandamus "Sustained" without leave to amend and the Petition "Dismissed" (Prendergast, Judge).

Apr. 27, 1961—Judgment absolute in favor of the defendants for costs of suit.

Apr. 27, 1961—Memorandum Opinion of Court filed.

Apr. 29, 1961—Plaintiffs' Appeal to Court of Appeals filed.

May 9, 1961—Plaintiffs' Appeal to Court of Appeals filed.

IN THE SUPERIOR COURT OF BALTIMORE CITY

PETITION FOR WRIT OF MANDAMUS—Filed December 7, 1960

The Petition of William J. Murray, III, infant, by Madalyn E. Murray, his mother and next friend and Madalyn E. Murray, individually, through Harold Buchman and Leonard J. Kerpelman, their attorneys, respectfully represents unto your Honor:

[fol. 2] 1. William J. Murray, III, fourteen years of age, one of the two Petitioners herein, has been, during the time hereinafter mentioned, and is at the time of the filing herein, a citizen and resident of Baltimore City, State of Maryland, and is a student in the ninth grade at Woodbourne Junior High School, a public school in said City and State.

2. Madalyn E. Murray, Petitioner, is the mother of said William J. Murray, III, and has been, during the time hereinafter mentioned, and is at the time of the filing herein, a citizen, resident and taxpayer of Baltimore City, State of Maryland.

3. The Respondents, hereinabove specified, constitute the Board of School Commissioners of Baltimore City, and by virtue of Article 77, Section 203, of the Annotated Code of Maryland, 1957 Ed., have supervisory power and control over the public schools of Baltimore City, with the power, among other things, to select textbooks for the public schools of said City, "provided such textbooks shall contain nothing of a sectarian or partisan character".

4. From 1905 to the date of filing herein, and at all times hereinafter mentioned, there has been and is now in effect a rule, known as Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City, made applicable to, and imposed upon the pupils attending the public schools of Baltimore City, including the said infant Petitioner herein, under the Compulsory School Attendance Law (Article 77, Section 231, of the Annotated Code of Maryland, 1957 Ed.) and said rule, together with a certain amendment thereto, hereinafter specified, is enforced by

the Respondents herein to the great damage and detriment of your Petitioners and in violation of their constitutional rights, as more particularly set forth below; and in derogation of said taxpayer's property rights and pecuniary interests; the said rule provides as follows:

"Section 6—Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used [fol. 3] by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class."

5. In response to protest by your Petitioners, the aforesaid rule was amended by the Respondents on November 17, 1960, so as to include the provision that "Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian;" and as amended, said rule, containing all the matter quoted in paragraph 4 above, is made applicable to, and imposed upon the pupils in the public schools of Baltimore City, including the infant Petitioner herein.

6. The uniform practice under the aforesaid rule in the public schools of Baltimore City has been to read from the King James version of the Holy Bible and, in fact, the Petitioner, William J. Murray, III, was, by reason of the rule set forth in paragraph 4 above, required and compelled, contrary to his will and conscience, to attend the reading of the Bible ceremony and to recite the Lord's prayer, which was practiced and performed as an opening exercise on each school day in his class in said Woodbourne Junior High School, until November 17, 1960, when said Petitioner was excused from said exercise at the written request of his mother, in accordance with the amendment to said rule.

7. Your Petitioners are atheists and define their beliefs as follows:

"An atheist loves his fellowman instead of a God.

An atheist believes that heaven is something for which

we should work now, here, on earth, for all men together to enjoy. An atheist believes that he can get no help through prayer, but that he must find in himself the inner conviction and the strength to meet life, to grapple with it, to sublime it, and to enjoy it. An atheist believes that only in a knowledge of himself and his fellow can he find the understanding that will help him to a life of fulfillment. He seeks to know himself and his fellowman rather than to know God. [fol. 4] An atheist believes that a hospital should be built instead of a church. An atheist believes that a deed must be done instead of a prayer said. An atheist strives for involvement in life and not escape into death. He wants disease conquered, poverty banished, war eliminated. He wants man to understand and love man; he wants an ethical way of life. He believes that we cannot rely on God, channel action into prayer, or hope for an end of troubles in a hereafter, that we are our brother's keeper, we are the keepers of our own lives; that we are responsible persons; that the job is here and the time is now."

8. Your Petitioners aver that the Rule of the Board of School Commissioners, hereinabove set forth, makes mandatory the reading of the Holy Bible and/or the Lord's prayer as a sectarian exercise in the public schools of Baltimore City, and thereby contravenes their right to freedom of religion under the First and Fourteenth Amendments of the United States Constitution, and violates the principle of separation between church and state, contained therein; they further aver that said Rule is contrary to, and violates Article 77, Section 203, of the Annotated Code of Maryland, 1957 Ed., which proscribes the selection by Respondents of textbooks of a sectarian or partisan character for the public schools of Baltimore City.

9. More particularly, the Petitioners aver that the said Rule, as practised, violates the said constitutional rights of the Petitioners in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the

majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith.

10. Your Petitioners further aver that the said amendment to the Rule, excusing those from participating in, or [fol. 5] attending the said opening exercises of the class upon request, in no wise negates or mitigates the violation and infringement of their constitutional rights. The effect of said amendment is merely an opportunity for exclusion from a stated school exercise which a majority of the pupils have been taught to revere, and the exercise of which opportunity causes the excluded pupil, to wit: the Petitioner, William J. Murray, III, to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult. Such practice tends to destroy the equality of the pupils which the Constitution seeks to establish and protect, and to put a portion of the pupils to serious disadvantage in many ways with respect to the others.

11. Your Petitioners further show that they have petitioned and requested the Respondents in their capacity as the Board of School Commissioners of Baltimore City to cease and desist in their application and enforcement of the said Rule, and to direct the teachers in said public schools of Baltimore City to discontinue the unlawful and wrongful practice and exercise, above set forth, and to confine the instruction to be given by such teachers to the studies and branches of knowledge of a non-sectarian nature, lawfully provided for said pupils; but that said Respondents, in said capacity, have wholly neglected and refused, and still do wholly neglect and refuse to interfere in said matter, and have and do wholly refuse to perform the duties legally devolving upon them, and have and to now permit said above mentioned exercise to be carried on as above set forth.

Wherefore, your Petitioners pray that a Writ of Mandamus may issue from this Court to said Respondents, commanding them to rescind and cancel the aforesaid Rule and to cause said teachers in Baltimore City to discontinue the practice and exercise above set forth.

Leonard J. Kerpelman, Attorney for Petitioners.

[fol. 6]

IN THE SUPERIOR COURT OF BALTIMORE CITY

DEMURRER—Filed January 16, 1961.

Now Come John N. Carlett, President, Samuel Epstein, Mrs. M. Richmond Farring, Eli Frank, Jr., Dr. Roger Howell, Henry P. Irr, Dr. William D. McElroy, Mrs. Elizabeth Murphy Phillips, and John R. Sherwood, individually and constituting The Board of School Commissioners of Baltimore City, Respondents in the above entitled matter, by their attorneys, Harrison L. Winter, City Solicitor, Ambrose T. Hartman, Deputy City Solicitor, and Philip Z. Altfeld, Assistant City Solicitor, and demur to the Petition For Writ of Mandamus filed herein against them, and for reason therefor say

1. That the Petition For Writ of Mandamus filed herein does not state a cause of action for which relief may be granted by way of mandamus.

2. And for such other reasons that may be assigned at the time of the hearing of this Demurrer.

Harrison L. Winter, City Solicitor, Ambrose T. Hartman, Deputy City Solicitor, Philip Z. Altfeld, Assistant City Solicitor, Attorneys for Defendants.

IN THE SUPERIOR COURT OF BALTIMORE CITY

MEMORANDUM OPINION—April 27, 1961

This is an action brought by two avowed atheists who protest the continuing enforcement of a rule of the Board of School Commissioners of Baltimore City which provides that a chapter in the Holy Bible shall be read, or the Lord's Prayer recited, in the opening exercises of each school day. William J. Murray, III, who appears by his mother and [fol. 7] next friend, is a fourteen year old student in the ninth grade at Woodbourne Junior High School. His mother, Madalyn E. Murray, joins in the petition in the role of a citizen, resident and taxpayer. Respondents have demurred to the petition on the ground that it fails to state a cause of action for which relief may be had by mandamus. Since the demurrer admits all facts well pleaded, it is in order to recite the allegations in some detail.

The rule of the Board which petitioners claim is objectionable, was adopted in 1905, some fifty-six years ago, and with certain modifications has been in force ever since. It reads as follows:

> "Section 6 — Opening Exercise. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class."

On November 17, 1960, upon the complaint of petitioners, the Board amended the rule by adding: "Any child shall be excused from participating in the opening exercises upon the written request of his parent or guardian." Not content with that, petitioners now seek to have the entire rule rescinded on the ground that it violates their rights under the First and Fourteenth Amendments of the Federal Constitution and under the basic authority of the School Board contained in Section 203 of Article 77 of the Maryland Code (1957 Ed.). The statute, incidentally, is quoted in part as empowering the Board to select textbooks for the

public schools of the City "provided such textbooks shall contain nothing of a sectarian or partisan character." The inference that the Holy Bible is either sectarian or partisan is a rather startling and novel thought.

Specifically, petitioners aver that the enforcement of the rule "threatens their religious liberty" in one way or another. Just how the religious liberty of a person who has no religion can be endangered is by no means made [fol. 8] clear. When a pertinent question on that score was asked petitioners' counsel during the argument, he had no answer but conveniently changed the subject.

It is further alleged that the rule "pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your petitioners, promoting doubt and questions of their morality, good citizenship and good faith." All this is taking place, it is said, despite the fact that the rule has been in effect for more than half a century without apparently disrupting the morals or adversely affecting the good citizenship of the community. As to the amendment excusing pupils from attending such exercises, it is claimed that "The effect of said amendment is merely an opportunity for exclusion from a stated school exercise which a majority of the pupils have been taught to revere, and the exercise of which opportunity causes the excluded pupil, to wit: the petitioner, William J. Murray, III, to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult." This is strong language. Quite naturally, it raises the question as to what might be the reaction of the pupils who "revere" the reading of Sacred Scripture and the recitation of prayer, if this were denied them.

The fundamental issue is clear, namely, whether the adoption and enforcement of the rule in question is a matter within the discretion of the Board or constitutes an illegal act. In the former event, the writ of mandamus will not be issued; in the latter, the Board's action may be restrained by the issuance of the writ. The applicable principle of law was well stated in *Upshur v. Baltimore*, 94 Md. 743, 746, 51 A. 953:

"It must be remembered that a writ of mandamus is not a writ of right granted as of course, but it is one which is allowed only at the discretion of the Court to whom the application is made. This discretion will not be exercised in favor of applicants unless some just or useful purpose may be answered by the writ.' [fol. 9] *Booze* v. *Humbird*, 27 Md. 4. It is also well settled that the relator's right which is sought to be enforced must be a clear, distinct legal right; *State ex rel., O'Neill* v. *Register, et al.*, 59 Md. 287, and that it must be certain and free from doubt. Mandamus is an extraordinary process, 'and, if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment * * * this writ will not be granted. * * * And it will not be allowed unless the Court is satisfied that it is necessary to secure the ends of justice.'"

See also *Lee* v. *Leitch*, 131 Md. 30, 101 A. 716; *Thomas* v. *Field*, 143 Md. 128, 122 A. 25; *Red Star Line* v. *Baughman*, 153 Md. 607, 139 A. 291; *Walter* v. *Montgomery County*, 179 Md. 665, 22 A. 2d 472; *Hecht* v. *Crook*, 184 Md. 271, 40 A. 2d 673; *Masson* v. *Rendóllar*, 193 Md. 683, 69 A. 2d 482; *Durkee* v. *Murphy*, 181 Md. 259, 29 A. 2d 233; *Mahoney* v. *Supervisor of Elections*, 205 Md. 325, 106 A. 2d 927; *District Heights* v. *Prince George's County*, 210 Md. 142, 122 A. 2d 489.

As already noted, the authority of the Board to pass the disputed rule is founded upon power given it by the legislature. The pertinent statutes are sections 202 and 203 of Article 77 of the Maryland Code (1957 ed.) which provide:

"202. *Authority to establish free school system.* The Mayor and City Council of Baltimore shall have full power and authority to establish in said city a system of free public schools, which shall include a school or schools for manual or industrial training, under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a Board of

School Commissioners; may prescribe rules for building schoolhouses, and locating, establishing and closing schools, and may in general do every act that may be necessary or proper in the premises."

[fol. 10] "203. *Powers and duties of Board of School Commissioners.* The Board of Commissioners of public schools of Baltimore City, or by whatever name the body may be known that has supervisory power and control over the public schools of Baltimore City, shall have power to examine, appoint and remove teachers, prescribe the qualifications, fix the salaries subject to the approval of the mayor and city council, and select textbooks for schools of said city; provided, such textbooks shall contain nothing of a sectarian or partisan character. The Board of Commissioners of public schools of said city shall annually make a report to the State Board of Education of the condition of the schools under their charge, to include a statement of expenditures, the number of children taught, and such other statistical information as may be necessary to exhibit the operation of the schools."

These statutes are important not only because they authorize the Board's actions, but also because they reveal that the legislature never intended that religion must be excluded from the public schools, but simply things "of a *sectarian* or partisan character." The legislature has proscribed the teaching of sectarian religion, not religion itself; and this policy is in complete harmony with both the First and Fourteenth Amendments of the Federal Constitution as explained by the United States Supreme Court.

The First Amendment, taken by itself, is of no avail to petitioners, for it merely prevents the Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof." However, the Fourteenth Amendment makes the First applicable to the states, so the two amendments must be read in conjunction with one another. It is important to note that neither amendment interdicts religion. Rather, the establishment of a state church, that is, sectarian and the interference with the free exercise of religion, are prohibited.

Three decisions of the Supreme Court, of recent vintage, should be given preferred attention. The first of these, [fol. 11] *Everson* v. *Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, is not in point but does afford an insight into the Court's reasoning.

There, a New Jersey statute authorized the local school districts to make rules and contracts for the transportation of children to and from the schools. The Board of Education of Ewing Township authorized reimbursement to the parents of children using public transportation to attend school. Part of this money was for payment of transportation of children who went to parochial schools. These schools regularly give their pupils religion training in the Catholic Faith. A taxpayer filed suit challenging the right of the Board to reimburse parents of parochial school students, contending that this practice violated both the Federal and State Constitutions. The trial court held the legislature was without power to authorize such payment under the New Jersey Constitution, but this was reversed by the New Jersey Court of Errors and Appeals. The Supreme Court affirmed in a five-to-four opinion.

Next came the celebrated case of *McCollum* v. *Board of Education*, 333 U.S. 203, 92 L. Ed. 649, 68 S. Ct. 461, decided in 1948.

The School Board of Champaign, Illinois had set up a released-time program for public school pupils whereby ministers, priests and a rabbi were permitted to use the classrooms for religious instruction or services. Any child wishing to be excused was permitted to do so upon presenting a note from his parents, but was required to remain in the school study hall or elsewhere until dismissed for the day. The constitutionality of this arrangement was approved by the lower courts, but rejected by the United States Supreme Court.

This decision was at first heralded as a victory for atheism. However, a careful reading of the various opinions and concurring opinions fails to support that conclusion at all. Justice Frankfurter, for example, speaking for the majority, quoted and relied heavily on the remarks of President Grant in his address to the Army of the Tennessee in 1875:

[fol. 12] "Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common-school education, *unmixed with sectarian, pagan, or atheistical dogmas.* Leave the matter of religion to the family alter, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate." (Emphasis supplied.)

Of equal interest are the views of Justice Jackson, who, while concurring with the majority of the Court, objected to the sweeping effect of its ruling:

"Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. 'Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived [fol. 13] from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by

> a large part of the world's people. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

The third decision is that of *Zorach* v. *Clauson*, 343 U.S. 306, 96 L. Ed. 954, 72 S. Ct. 679, which most commentators consider to be a retreat from *Everson* and *McCollum*.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school building and grounds and go to religious centers for instructions or devotional exercises. A student is released on written request of his parents. Those not being released stay in the classrooms. The churches or synagogues make weekly reports to the schools, sending a list of children who have been released from public schools but who have not reported for religious instructions. The New York Court of Appeals sustained its constitutionality and this was affirmed by the Supreme Court. The interesting language in that case is found in the following words of Justice Douglas:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the [fol. 14] public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * *"

There can be no doubt that historically and in keeping with ancient tradition, Maryland, and its citizens, have always been religious. Indeed, the great seal of the State contains the motto "Scuto Bonae Voluntatis Tuae Coronasti Nos" meaning "with favor wilt Thou compass us as with a shield" (Psalms v: 12).

There was one other case before the Supreme Court in which a question, quite similar to the one involved, was raised. However, the appeal was dismissed for want of standing of the appellant in an action wherein the high court of New Jersey had upheld the reading of the Bible in the public schools of that state. *Doremus* v. *Board of Education*, 342 U.S. 429; 96 L.E. 475; 72 S. Ct. 394.

If religion, pure and undefiled and in every form, were removed from the classrooms, there would remain only atheism. While the present petitioners clamor for religious freedom, their ultimate objective is religious suppression. The two concepts are mutually repugnant. One cannot practice his religion if he has no religion to practice. If petitioners were granted the relief sought, then they, as non-believers, would acquire a preference over the vast majority of believers. Our government is founded on the proposition that people should respect the religious view of others not destroy them.

In at least one other decision of a state court, a released time program was approved with qualifications. In *Perry* v. *School District*, 54 Wash. 2d 886, 344 P. 2d 1036, the Washington Supreme Court upheld the constitutionality of the program but modified the judgment of the lower court to the extent of holding that the distribution of informa-[fol. 15]-tion cards in public schools when making announcements or explanations for the purpose of obtaining parents' consent for their children's participation in the released time program, by representatives of religious groups or instructors in the schools was in contravention of the state constitution. Thus sectarian control was proscribed.

In New York, the sole issue of prayers in public schools was contested in *Engel* v. *Vitale*, 191 N.Y.S. 2d 453 (Sup. Ct. 1959). Taxpayers in the school district brought mandamus proceedings to compel the Board of Education to discontinue the use, in public schools, of the prayer "Al-

mighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." In a lengthy opinion by Justice Meyer the Special Term held that the "establishment" clause of the First Amendment did not prohibit the *non-compulsory* saying of prayer in public schools so long as the School Board takes affirmative steps to protect the rights of those who, for whatever reason, choose not to participate in the saying of the prayer.

Another case of interest is that of *Schempp* v. *School District*, 177 F. Supp. 398 (E.D. Pa. 1959), in which a Unitarian parent sought to enjoin enforcement of a state statute providing for the reading of ten verses of the Holy Bible in public school classrooms each day. In an ably written opinion by Judge Biggs, it was held that the statute in question was unconstitutional but it was further noted that attendance at such Bible reading was compulsory under Pennsylvania Law. The inference is broadly spelled out that if pupils who objected to hearing the Bible read could be excused, a different conclusion would probably have been reached. In this connection, it should be noted that the present respondents have expressly made provision to release the students upon written request from their parents to that effect.

Incidentally, the rule of the Board of School Commissioners in Baltimore City is by no means unique. Many [fol. 16] states have statutes requiring the Bible to be read in the public schools.*

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* Alabama, Ala. Code tit. 52 Sec. 542 (1940); Delaware, Del. Code Ann. tit. 14, Sec. 4102 (1953); Georgia, Ga. Code Sec. 32-705 (1933); Idaho, Idaho Code Ann. Sec. 33-2705-07 (1947); Kentucky, Ky. Rev. Stat. Ann. Sec. 158.170 (1955); Maine, Me. Rev. Stat. Ann. ch. 41, Sec. 145 (1954); New Jersey, N.J. Rev. Stat. Sec. 18:14-77 (1937); also provided for is the reading of the Lord's Prayer, N.J. Rev. Stat. Sec. 18:14-78 (1937); Pennsylvania, Pa. Stat. Ann. tit. 24, Sec. 15-1516 (1950); Tennessee, Tenn. Code Ann. Sec. 49-1307 (1955). Note: in the above statutes only Georgia and Kentucky provide for students to be excused * * * with parent or guardian permission. Some states merely provide that the Holy Scripture may be read in public schools: Kansas, Kan. Gen. Stat. Ann. Sec. 72-1628 (Supp. 1957); North Dakota (at option of

It is abundantly clear that petitioners' real objective is to drive every concept of religion out of the public school system. If God were removed from the classroom, there would remain only atheism. The word is derived from the Greek *atheos*, meaning "without a god." Thus, the beliefs of virtually all the pupils would be subordinated to those of Madalyn Murray and her son. Any reference to the Declaration of Independence would be prohibited because it concludes with the historic words of the signers, "* * * with a firm reliance on the protection of Divine Providence we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." Any mention of Lincoln's Gettysburg Address would be anathema because in it the Great Emancipator prayed that "this nation, under God, shall have a new birth of Freedom." It is even possible that United States currency would not be accepted in school cafeterias because every bill and coin contains the familiar inscription, IN GOD WE TRUST.

The court finds that the facts alleged in the petition for a writ of mandamus do not spell out any violation of petitioners' constitutional rights. The power of the School [fol. 17] Board to require the reading of the Holy Bible or recitation of the Lord's Prayer as part of the opening exercises each day, with the provision that objecting students may be excused, is a matter within the Board's discretion. For this reason, the writ of mandamus cannot be issued. The court is informed by counsel that there are no additional facts that could be added by amendment so it necessarily follows that it would be futile to afford petitioners the opportunity to amend. Accordingly, for the reasons given, the demurrer is sustained without leave to amend and the petition is dismissed.

J. Gilbert Prendergast, Judge.

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teacher, but parent or guardian may excuse child); N.D. Rev. Code Sec. 15-3812 (1943); Oklahoma, Okla. Stat. Ann. tit. 70, Sec. 11-1 (1941). Two states provide that the Bible shall not be excluded from their public schools: Indiana, Ind. Ann. Stat. Sec. 28-5101 (1948); and Iowa, Iowa Code Ann. Sec. 280.9 (1946).

[fol. 18]

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1961

No. 90

WILLIAM J. MURRAY, 3RD, infant by MADALYN E. MURRAY, his mother and next friend, and MADALYN E. MURRAY, Appellants,

v.

JOHN N. CURLETT, President, et al., individually and constituting THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, Appellees.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY
(J. GILBERT PRENDERGAST, JUDGE)

Appellees' Appendix—Filed September 25, 1961

[fol. 19]

OPINION OF ATTORNEY GENERAL OF MARYLAND—
November 2, 1960

Re: Public School Opening Exercise

Dr. Thomas G. Pullen, Jr.
State Superintendent of Schools
State Department of Education
301 W. Preston St.
Baltimore 1, Md.

Dear Mr. Pullen:

You have brought to our attention a situation which has arisen in one of the public schools of Baltimore City. The matter pertains to the legal obligation of a student, age 14, who professes to be an atheist, to attend school over

his objection that the school was enforcing religious training. The specific objections raised are to the morning opening exercise in which a selection from the Bible is read without comment, and to the use of the "Story of Nations" history text in which, according to the student's mother, "distortions and misrepresentations are made, particularly in the areas of religious and political interpretations of events, both historic and current."

I.

As to the question of attendance generally, we refer you to the provisions of Article 77, Section 231, Annotated Code of Maryland (1957 Ed.). This law, known as the Compulsory School Attendance Law, makes school attendance of children between the ages of seven and sixteen years mandatory. The exception for children of sub-normal intelligence is not pertinent here. This mandate applies both to the children and their parents. A violation is made a misdemeanor punishable by a $5.00 fine for each offense. Objection to curriculum, textbooks, exercises, teachers, etc., is not a valid excuse for non-compliance with this law. The only recourse for persons objecting to attendance on [fol. 20] grounds similar to the above would be to enroll in a private school. We therefore advise, in the instant case, that if the parent and child refuse to comply with Section 231, for the reasons they currently advance, they should be prosecuted for truancy as specified in the law. Such action would not be a deprivation of any personal constitutional rights, real or illusory, which they might wish to protect. These rights may be presented and litigated if necessary in other ways, such as a proceeding by the protestants against the School Commissioners for mandamus or injunctive relief.

II.

Next we turn to the issue concerning the use of a history textbook, "Story of Nations", by Henry Holt & Co., Inc., edited by Professors Lester B. Rogers and Fay Adams, of the University of Southern California and Walker Brown, of a Los Angeles high school. This text, written for the

ninth and tenth grade level, covers the whole span of world history. Obviously, it is not written or intended to be a detailed account. As a matter of academic interest only, we have reviewed the book and in particular the portions cited as objectionable, and we find it to be an accurate, objective and intellectual history book. However, it is not our duty or prerogative to review textbooks used in the schools of this State. This is a matter wisely left to the discretion of the school authorities.

Section 145 of Article 77, Code, provides:

> "*Freedom from sectarianism or partisanship.* School books shall contain nothing of a sectarian or partisan character."

This, of course, does not mean that in a history text there may be no reference to religion generally or to roles played by various religious figures or denominations in the development of history. Such a contention would be illogical and unsupported in law. Article VI, Section 7 (Textbooks) of the Rules of the Board of School Commissioners, relating to approval of a majority of the Board in the selection [fol. 21] of books, has been reviewed by us, and it appears to adequately cover this matter.

No right exists in a student or his parents to object to the use of any particular textbooks or in a student to legally absent himself from a class using a book he disfavors. If the latter event occurs the student should be disciplined in such manner as the teacher and school principal see fit. The provisions of Section 131 of the Public School Laws authorize suspension and expulsion in proper cases.

III.

The final question relates to validity of Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City. This rule provides as follows:

> "Section 6—*Opening Exercises.* Each school, either collectively or in classes, shall be opened by the reading, without comment of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay ver-

sion may be used by those pupils who prefer it. Appropriate Patriotic exercises should be held as a part of the general opening exercises of the school or class."

The uniform practice under this rule in the public schools of Baltimore City has been to read from the King James Version of the Holy Bible. No question has been raised concerning the "patriotic exercise", the use of the particular version of the Bible, or the recitation of a prayer; therefore, these matters are not discussed here. The sole issues can be reduced to two: Is Bible reading in public schools constitutional *per se*, and, if so, must the rule providing for such an exercise, further provide for the excuse of those who object? We answer both questions in the affirmative.

A.

The objections to Bible reading, or any devotional exercise, in the public school have been based upon the initial prohibition of the First Amendment to the United States [fol. 22] Constitution as made applicable to the States through the Fourteenth Amendment. The provision prohibits State "establishment of religion". In the landmark case of *Zorach* v. *Clauson*, 343 U.S. 306, 96 L. Ed. 554, the Supreme Court held that the New York "released time" program was not a violation of constitutional "establishment" clause. Justice Douglas reviewed our fundamental policy toward religion at page 313, as follows:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates

> the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * * "

It would seem reasonable to conclude that the "establishment" clause dictates that there be a separation between church and state, but not that the state need be stripped of all religious sentiment. It would be tragic if the State of Maryland, whose history, traditions, founding, and its early laws are steeped in religious connotations, would be compelled to forbid to its children as a part of their education, the right and duty to bow their heads in humility before the Supreme Being. It is interesting to note that the State Seal bears a Biblical inscription: "Scuto Bonae Voluntatis Tuae Coronasti Nos"—Thou has crowned us with the shield of Thy good will (Psalm 5:12).
[fol. 23] As was said in *Engel* v. *Vitale*, 191 N.Y.S. 2d 453, at 486:

> "The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation."

Such accommodation, if properly qualified as hereinafter mentioned, does no violence to the First Amendment of our Federal Constitution. Of the cases we have found dealing with the reading of the Bible, ten have upheld and only three have struck down the practice. (Upheld: *Doremus* v. *Board of Education*, 5 N.J. 435, 75 A. 2d 880, 1950, app. dism. 342 U.S. 429, 96 L. Ed. 475; *Donahoe* v. *Richards*, 1854, 38 Me. 379; *Hart* v. *School District*, 2 Lanc. L.R. 346; *Messle* v. *Hum*, 1 Ohio N.P. 140; *Stevenson* v. *Hanyon*, 4 Pa. Dist. R. 395; *Curran* v. *White*, 22 Pa. Co. Ct. R. 201; *Pfeiffer* v. *Board of Education*, 118 Mich. 560, 77 N.W. 250; *Kaplan* v.

Independent School District, 171 Minn. 142, 214 N.W. 18; *People ex rel. Vollmar* v. *Stanley*, 81 Colo. 276, 255 P. 610; *Lewis* v. *Board of Education*, 285 N.Y.S. 164; Struck down; *Schempp* v. *School District of Abington*, 177 F. Supp. 398, Pa.—1959, remanded by U.S. Supreme Ct. 10/24/60, 29 L.W. 3120; *State ex rel. Weiss* v. *District Board*, 76 Wisc. 177, 44 N.W. 967; *State ex rel. Dearle* v. *Frazier*, 102 Wash. 369, 173 P. 35.)

Two recent holdings, supporting the position we now adopt have undertaken to review the whole field of state-church relationship and the history of religious freedom in the light of our First Amendment, *Engel* v. *Vitale*, *supra*, and *Doremus* v. *Board of Education*, *supra*.

The principle thus adduced does not belittle the parents' primary right of control over their children. However, the State, when acting in the general welfare of all its citizens, has a paramount right of control if there can be shown to be a substantial nexus between the action required and the end sought to be attained.

[fol. 24]. Among the many instances of legal regulation of religious acts are the use of fluorinated water, *Baer* v. *City of Bend* (Ore.), 292 P. 2d 134; the sale of Watchtower magazine by minors, *Prince* v. *Mass.*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645; observance of the Sabbath, *Seales* v. *State*, 47 Ark. 476, 1 S.W. 769; vaccination, *Vonnegut* v. *Baun*, 206 Ind. 172, 188 N.E. 677; physical examination of school children, *Streich* v. *Board of Education*, 34 S.D. 169, 147 N.W. 779; salute to flag, *Minersville School Dist.* v. *Gobitis*, 108 F. 2d 683.

As applied to this case, we believe that while every individual has a constitutional right to be a non-believer, that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude.

B.

Having ruled that it is constitutional to require the reading of the Bible as a morning exercise in our public schools, we turn to the matter of compulsion in joining such exercise. The second tenet of the First Amendment, as made applicable to the States through the Fourteenth Amend-

ment, prohibits restriction of the "free exercise" of religion. The *Zorich* and *Engel* cases, *supra*, as well as other cases in this area, uniformly hold that despite the basic principle, a school devotional exercise would nonetheless be objectionable if there were any direct compulsion. Any coercion would be an abridgment of one's individual right to the "free exercise" of religion. As noted in *Hopkins* v. *State*, 193 Md. 489, the sole qualifications to religious freedom relate to acts rather than to beliefs. See also *Reynolds* v. *U.S.*, 98 U.S. 145, 25 L. Ed. 244. Freedom of belief is absolute. The Supreme Court in *Everson* v. *Board of Education*, 330 U.S. 1, 91 L. Ed. 711, and *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 92 L. Ed. 648, recognizes that freedom to believe includes freedom not to believe at all. That is to say, an atheist has equal rights with those who are theistic. The *Zorach* case, *supra*, represented a retreat from the prior views only to the extent that the Court refused priority to the non-believer's right.

[fol. 25] For the reasons stated, we are of the opinion that the present rule regarding Bible-reading must be amended to provide a procedure to protect the rights of those who choose not to participate. The exact provision to be made is best left to the discretion of the Board. We do suggest that non-participation be allowed to take the form of either remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise. The latter course should be handled discreetly without comment or punishment. You may wish to allow non-participants to arrive at the conclusion of the exercise. We further caution that the exercise should be conducted without requirement or restriction as to the specific posture, language, dress or gestures to be used by individual participants, so as not to interfere with personal religious customs.

We recognize it may be contended that even such a provision for non-participation will not cure an alleged compulsion through the subtle pressure of embarrassment. On this issue we concur in the reasoning of the *Engel* case, *supra*, at 492:

> "To recognize 'subtle pressures' as compulsion under the amendment is to stray far afield from the oppressions the Amendment was designed to prevent; to raise the psychology of dissent, which produces pressure on every dissenter, to the level of governmental force; and to subordinate the spiritual needs of believers to the psychological needs of nonbelievers (is unnecessary)."

The *Engel* case was affirmed by the New York Supreme Court of Appeals Division 2d Dept. on October 17, 1960 (29 L.W. 2178). Justice Beldock aptly stated:

> "It may well be that, despite all these safeguards, some vestige of compulsion due to embarrassment may still remain. Such embarrassment, however, is the inevitable consequence of dissent. It is the price that every nonconformist must pay."

[fol. 26] It is our conclusion that while the Board may properly provide for a morning devotional exercise, it must further provide that those so desiring should be excused from attendance at this exercise.

Very truly yours,

C. Ferdinand Sybert, Attorney General.
James O'C. Gentry, Asst. Attorney General.

CFS:MH
JOG

[fol. 27]

IN THE COURT OF APPEALS OF MARYLAND

No. 90

September Term, 1961

WILLIAM J. MURRAY, III, Infant, etc., et al.,

v.

JOHN N. CURLETT, et al. and BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

Brune, C.J., Henderson, Hammond, Prescott, Horney, Marbury, Barrett, Lester L. (Specially Assigned), JJ.

OPINION BY HORNEY, J.—April 6, 1962

Brune, C.J., Henderson and Prescott, JJ., dissent.

[fol. 28] This appeal presents the question of whether the daily opening exercises of the Baltimore City public schools —wherein the Holy Bible is read and the Lord's Prayer is recited—violate the constitutional rights of a student and his mother who claim they are atheists.

The judgment appealed from is one for costs entered by the lower court after it had sustained without leave to amend the demurrer of the appellees (the Board of School Commissioners of Baltimore City and the president and other individual members thereof constituting the "Board") to the petition of the appellants (William J. Murray, III, the "student," and Madalyn E. Murray, the "mother" or "parent") for a writ of mandamus. The writ was sought to compel the Board to "rescind and cancel" a rule (and a recent amendment of it) adopted by the Board in 1905, pursuant to the power and authority conferred on it by the State, concerning the opening exercise program in the public schools. The rule and amendment attacked is designated as § 6 of Article VI of the Rules of the Board, and reads as follows:

"Section 6—Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should [also] be held as a part of the general opening exercise of the school or class. *Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.*"

[fol. 29] The italicized portion of the rule was added by an amendment on November 17, 1960, in order to comply with an opinion rendered by the Attorney General (C. Ferdinand Sybert, now a member of this Court) at the request of the State Superintendent of Schools following a protest by the appellants to the effect that to require the atheistic student to attend the daily exercises was to compel him to participate in a religious training program that was offensive to him.

The petition, in addition to stating that the fourteen year old boy is a student in a public school and that the parent is a resident and taxpayer, further states that the practice under the rule had been to read from the King James version of the Bible and that the student, until the adoption of the amendment, was "required and compelled" to attend the reading program and to recite the Lord's Prayer, but that when the amendment was made he was excused at the request of his mother from further attendance.

The petitioners, in contending that the mandatory rule contravenes their freedom of religion under the first and fourteenth amendments in that it violates the principle of separation between church and state,[1] claim that the en-

[1] The petitioners also contended that the rule was contrary to the provisions of the Code (1957), Art. 77, § 203, proscribing the selection of textbooks of "a sectarian or partisan character," but, other than stating in their brief that they objected to the conduct of religious teachings, whether sectarian or non-sectarian, in public schools, they did not pursue this contention on appeal

forcement of the rule "threatens their religious liberty" in [fol. 30] one way or another; that the rule "subjects their freedom of conscience to the rule of the majority"; and that the rule, by equating moral and spiritual values with religious values has thereby rendered their beliefs and ideals "sinister, alien and suspect" which tends to promote "doubt and question of their morality, good citizenship and good faith."

It is further claimed that the amendment excusing the student from participating in or attending the opening program "in no wise negates or mitigates the violation and infringement of their constitutional rights"; that the exclusion of the student has caused him to lose caste, to be regarded with aversion, and to be subjected to reproach and insult; and that the practice "tends to destroy the equality of the pupils" and place him in a disadvantageous position with respect to other pupils.

In conclusion, the petitioners state that although they have requested a cessation of the practice, the use of the rule has not ceased, but has been continued, and that they are thereby harmed.

The Board demurred to the petition on the ground that it did not state a good cause of action for which relief could be granted by way of mandamus. The lower court sustained the demurrer and dismissed the petition without leave to amend. In its memorandum opinion, the court stated two reasons for the action taken. The ultimate decision was based on the theory that the Board, in requiring [fol. 31] that the Holy Bible be read or the Lord's Prayer be recited each school day as a part of the opening exercises, with a proviso that objecting students could be excused, was acting in the exercise of discretionary power that the issuance of a writ of mandamus could not stay. But prior to that, the court had found that the facts alleged in the petition for the writ did not, "spell out any violation" of the constitutional rights of the petitioners.

Arguments in this case were heard twice. The initial argument was heard by five of the seven judges of this Court on both questions presented by the appeal: (i) whether mandamus is a proper action in which to test the constitutionality of the school board rule; and (ii) whether

the provisions of the regulation under attack violate a constitutional right of the petitioners. The reargument was heard by seven judges, one of whom was substituting for Judge Sybert, and in the order directing reargument, we limited the reargument to the constitutional questions raised by the petition. We were then of the opinion and we now hold that where the performance of a duty prescribed by law depends on whether the statute or regulation is constitutional or invalid, there is no reason why the question may not be determined on a petition for a writ of mandamus under such circumstances as are present in this case. *Welch* v. *Swasey*, 79 N.E. 745 (Mass. 1907); 38 Corpus Juris, *Mandamus*, § 681b(1); 16 C.J.S., *Constitutional Law*, 95. See also *High's Extraordinary Legal Remedies* (3rd ed.), [fol. 32] § 332b, p. 325, where, in citing *State* v. *District Board*, 76 Wis. 177 (1890), it is said that "[m]andamus will lie against a board intrusted with the management of public schools to compel them to discontinue the reading of the Bible in such schools." Moreover, there are a number of decisions in this state where the courts without challenge as to the propriety thereof have proceeded to determine a constitutional question preliminary to the grant or refusal of a writ of mandamus. See, for example, *University* v. *Murray*, 169 Md. 478, 182 Atl. 590 (1936); *Williams* v. *Zimmerman*, 172 Md. 563, 192 Atl. 353 (1937); *Torcaso* v. *Watkins*, 223 Md. 49, 162 A.2d 438 (1960), *reversed* (on another ground and decided on merits), 367 U.S. 488 (1961).

The principal question is whether the demurrer was properly sustained. The appellees contend preliminarily that the petitioners have not shown they have standing to challenge the rule and the practice under it in the schools of Baltimore City.

If the petitioners lacked standing to sue, this would require affirmance even though the rule and the practice were unconstitutional. Since we find them to be constitutional, we shall assume the petitioners had standing to sue and proceed to discuss the reasons for our views as to constitutionality.

The essential question thus presented is whether the daily Bible reading and Prayer recitation program, at which attendance is not compulsory, is a violation of the

"establishment of religion", and "free exercise" clause of the First Amendment (as applied to the States through the due process clause of the Fourteenth) or of the "equal [fol. 33] protection" clause of the Fourteenth Amendment. We think that neither constitutional provision is violated, for, as we see it, neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government.

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Thus spoke Justice Douglas (at p. 313) in the majority opinion in *Zorach v. Clauson*, 343 U.S. 306 (1952).

The Supreme Court of the United States has not yet passed on either of the constitutional questions posed by this appeal. Yet, there are several decisions concerning the separation of Church and State which we think point the way and clearly indicate that a public school opening exercise such as this one—where the time and money spent on it is inconsequential—does not violate the religious clauses of the First Amendment or the equal protection clause of the Fourteenth Amendment, as would the teaching of a sectarian religion in a public school on school time and at public expense.

[fol. 34] The first of the cases we have in mind is *Everson* v. *Board of Education*, 330 U.S. 1 (1947), where the Court, though it recognized that the clause against the establishment of religion was intended to erect "'a wall' of separation between church and state,'" held that the reimbursement of parents for the cost of transporting their children to parochial and public schools by bus did not violate the "establishment of religion" clause of the First Amendment because the purpose of the New Jersey statute was to provide safe transportation in the general public welfare.

In *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), however, where the Illinois public schools and the machinery for compelling attendance thereat were used by sectarian teachers to give religious instruction in such public schools to those pupils who were required to attend the religious classes at the request of their parents, while the other pupils (who were not attending the religious classes) were compelled to attend secular classes instead of being released, the Court held in no uncertain terms that such practices fell "squarely" under the ban of the First Amendment (made applicable to the States by the Fourteenth)."

And four years later in *Zorach* v. *Clauson*, *supra*, the Court, though following the *McCollum* case, distinguished it nevertheless by stating that a "released time" program of a type different from that involved in *McCollum* was not unconstitutional. In New York the public schools are permitted to release students during school hours on the request of parents to go to classes off school premises for [fol. 35] religious instruction, but those who are not so released stay on in public school classrooms. In holding that the program did not violate the First Amendment through the Fourteenth, the Court, after noting that the program did not involve religious instruction in public schools or the expenditure of public funds, nor the use of coercion to require public school students to go to religious classrooms, went on to point out (at p. 312) that if the First Amendment "in every and all respects" required a separation of Church and State, then:

> "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"

This then may well be the key to the difficult problem with which we are confronted.

We think there is little doubt that a decision in this case lies somewhere between the decision in *McCollum* and that in *Zorach*. In the *McCollum* case, where the "tax-established and tax-supported public school system [was utilized] to aid religious groups to spread their faith," the released time program was unconstitutional. And, in the *Zorach* case, where the public schools did no more than "accommodate their schedules to a program of outside religious instruction," the program was constitutional. It [fol. 36] is to be noted, however, that both programs were conducted during school hours, though one involved the use of state funds and the other was at the expense of the churches. But, here, where the use of school time and the expenditure of public funds is negligible, we think the daily opening exercises of the schools in Baltimore City are in the same category as the opening prayer ceremonies in the Legislature of this State and in the Congress of the United States, in the public meetings and conventions which are opened with prayers or supplications to God, and in the formal call of court sessions by the crier in State and Federal courts. For these reasons, and particularly because the appellant-student in this case was not compelled to participate in or attend the program he claims is offensive to him, we hold that the opening exercises do not violate the religious clauses of the First Amendment.

With regard to the effect of having been excused from attending the opening exercises, we think it is significant that the Supreme Court, in *School District of Abington*

Township v. *Schempp*, 364 U.S. 298 (1960), ordered *per curiam* that the judgment below be vacated and remanded the case to the district court for further proceedings, after it was learned that the Pennsylvania law had been so amended as to provide for the excusing of those students who objected to participating in a school opening ceremony quite similar to that in Baltimore City. It seems to us that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling factor in deciding whether or not a constitutional right has been [fol. 37] denied. In reaching this conclusion we are not unmindful that the District Court for the Eastern District of Pennsylvania has, upon the remand, reheard the case, and again held (in an opinion by Jolin Biggs, Jr., Circuit Judge, reported in F.Supp.2d [1962]) that the Pennsylvania statute is not constitutional despite the fact that objecting students could have been excused on the request of their parents, but we do not find the decision on remand persuasive and decline to follow it. Moreover, we think it is clear that the case at bar is not governed by the *McCollum* case on the question of compulsory participation, even though *McCollum* was "followed" in *Zorach* as well as in *Torcaso* on the "separation of church and state" point. In *McCollum*, there was a degree of compulsion, but in this case, as in *Zorach*, *all* compulsion has been removed so far as attendance of the appellant-student at the opening exercises is concerned.

Furthermore, we are not convinced that *Torcaso* v. *Watkins* (367 U.S. 488) has any bearing on our problem. True, it is a case involving the separation of church and state, but we think it is clearly distinguishable from the instant case. There, in holding that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion,'" the Court went on to say (at p. 495) that the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by a state-imposed criteria forbidden by the Constitution." In that case the [fol. 38] Court was concerned with the compulsion which required a non-believer to profess a belief in God in order to qualify for public office. The present case, however,

as has been pointed out, is completely devoid of any compulsion or coercion to attend the school opening exercises. Nor do we find any sustenance for the appellant-student in the Sunday Blue Law cases, including *McGowan* v. *Maryland*, 366 U.S. 420 (1961), which was cited at the reargument.

The Bible reading and Prayer recitation programs in the public schools of other states, at which attendance was not compulsory, have been held to be valid by the appellate courts of such states. In an early case, *Church* v. *Bullock*, 109 S.W. 115 (Tex. 1908), the Court, in upholding a resolution stipulating that students should be present at, but were not required to participate in, the public school exercises in which the Bible was read and the Lord's Prayer was recited, held that the program did not contravene the constitutional provision against the use of public funds to support sectarian religion. In the case of *People ex rel. Vollmar* v. *Stanley*, 255 Pac. 610 (Colo. 1927), the Court, although stating that children could not be required against the will of their parents to attend the reading of the Bible in public schools, nevertheless held that the Bible reading ceremony could not be prohibited altogether. In a comparatively recent case, *Doremus* v. *Board of Education*, 75 A.2d 880 (N.J. 1950); *appeal dismissed* 342 U.S. 429 (1952), the Supreme Court of New Jersey, in observing that the First Amendment did not prohibit the recognition of God, held that the noncompulsory practice of reading the Bible and reciting the Lord's Prayer, in conformity with the [fol. 39] applicable statute, did not constitute the establishment of religion or prohibit the free exercise thereof. And the recent case of *Engel* v. *Vitale*, 10 N.Y.2d 176, 218 N.Y.S.2d 659 (1961), presently pending in the Supreme Court of the United States, the Court of Appeals of New York affirmed by a divided court a decision of the Appellate Division (206 N.Y.S.2d 183) holding that the noncompulsory daily recitation of the "regents prayer"[2] in the public

[2] This prayer which is recited following the pledge of allegiance to the flag at the beginning of each school day is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

schools was not violative of either the state or federal guarantee of freedom of religion. See also *Donahoe* v. *Richards*, 38 Me. 379 (1854); *Moore* v. *Monroe*, 20 N.W. 475 (Iowa 1884); *Pfeiffer* v. *Board of Education*, 77 N.W. 250 (Mich. 1898); *Billiard* v. *Board of Education*, 76 Pac. 422 (Kan. 1904); *Hackett* v. *Brooksville Graded School District*, 87 S.W. 792 (Ky. 1905); *Wilkerson* v. *City of Rome*, 110 S.E. 895 (Ga. 1922); *Kaplan* v. *Independent School District*, 214 N.W. 18 (Minn. 1927); and *Lewis* v. *Board of Education*, 285 N.Y.S. 164 (N.Y.Misc.), *modified* 286 N.Y.S. 174 (App.Div.), *rehearing denied* 288 N.Y.S. 751 (App.Div.), *appeal dismissed* 12 N.E.2d 172 (Ct. of Apls. 1937), for other cases that have sustained the reading of the Bible and the recitation of prayers, including the Lord's Prayer, in public schools. And see the annotation in 45 A.L.R.2d 742.

[fol. 40] We come now to the other constitutional question as to whether the appellant-student has been denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment. He relies on *Brown* v. *Board of Education*, 347 U.S. 483 (1954), declaring as unconstitutional the segregation of the races in public schools, to support the theory that his self-exile from the opening exercises is having a deleterious effect on his relationship with other students in the school. The short answer to this claim is that the equality of treatment which the Fourteenth Amendment affords cannot and does not provide protection from the embarrassment, the divisiveness or the psychological discontent arising out of non-conformance with the mores of the majority. Cf. Footnote 7 to *Zorach* v. *Clauson*, *supra*, at p. 311 of 343 U.S. And see *Engel* v. *Vitale*, 191 N.Y.S.2d 453 (Spec.Term 1959). We hold that the opening exercises do not violate the equal protection clause of the Fourteenth Amendment.

Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation ceremonies at school opening exercises, we think we are bound by what we understand is the effect of *McCollum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area. So, having

decided that the school opening exercises in Baltimore City are not violative of either the First or Fourteenth Amendments, we hold that the demurrer as to both appellants was properly sustained.

For the several reasons stated herein, the judgment will be affirmed.

Judgment Affirmed; Appellants to Pay the Costs.

[fol. 41]

DISSENTING OPINION

Brune, C.J., dissenting.

This suit for a writ of mandamus brought by a minor through his mother as next friend and by his mother as such and as a taxpayer seeks to bar from the public schools of the City of Baltimore "the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." Such reading from the Bible and/or use of the Lord's Prayer are required, either collectively or in classes, as a part of the opening exercises in the public schools of Baltimore under a rule of the Board of School Commissioners of that City adopted in 1905 and amended in November, 1960 by adding this provision: "Any child shall be excused from participating in the opening exercises upon the written request of his parent or guardian." The respondents in the suit are (or were) the members of the Board of School Commissioners of Baltimore City.

The petitioners allege *inter alia*: that the minor petitioner is a student at one of the public schools of Baltimore[1]; that they are both atheists; that prior to the amendment of the above rule in 1960 the infant petitioner was required to attend the exercises prescribed by the rule and that since that amendment he has been excused from attend-

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[1] At the time the suit was filed, this petitioner was a student at one public school, but it was stipulated that at the time of the argument he was a student at another public school of Baltimore, and that his change of school does not render the case moot. Cf. *Doremus v. Board of Education*, 342 U.S. 429, 432-33, where a child's graduation did render the case moot with regard to such child.

ing upon his mother's written request; that the reading of the Bible and or of the Lord's Prayer constitute a sectarian [fol. 42] exercise in the public schools of Baltimore and so contravenes the First and Fourteenth Amendments to the Constitution of the United States; that the rule, as practiced, places a premium on belief as against non-belief, that it pronounces belief in God as the source of all moral and spiritual values, equating those values with religious values, and renders "sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith"; and that the amendment to the rule permitting pupils to be excused upon request from the opening exercises neither negates nor mitigates the infringement of their constitutional rights; that the effect of the amendment is "merely an opportunity for exclusion" of the student petitioner from a stated school exercise which a majority of the pupils have been taught to revere, and that the exercise of that opportunity causes him "to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult; and that such practice tends to destroy the equality of the pupils which the Constitution seeks to establish and protect."

The respondents demurred to the petition and their demurrer was sustained without leave to amend. Since the case comes before this Court on a ruling on demurrer, we must accept as true all well pleaded facts. *Mahoney v. Bd. of Supervisors of Elections*, 205 Md. 325, 327, 106 A. 2d [fol. 43] 927. A difficulty here (as in many other cases) is to draw a sharp line between allegations of fact and conclusions to be drawn therefrom, and the further problem arises as to whether a conclusion should be accepted as alleged, should be tested on the basis of facts of which courts may take judicial notice, or should be determined only on the basis of proof. See, for example, the several views as to an allegation of coercion expressed in the majority opinion of Mr. Justice Douglas and in the dissenting opinions of Mr. Justice Frankfurter and of Mr. Justice Jackson in *Zorach v. Clauson*, 343 U.S. 306, 311-12, 321-22, 323.

The majority and minority agree that mandamus is an appropriate remedy to enforce the rights here asserted. A

question has, however, been raised as to the standing of the petitioners to maintain the suit at all. The majority assumes, without deciding, that they have sufficient standing to do so, and those who join in this dissent are of the opinion that they do possess such standing. It may be that under *Doremus* v. *Board of Education*, 342 U.S. 429, the adult petitioner's interest as a taxpayer would not be sufficient, though this case seems rather closer to *Everson* v. *Board of Education*, 330 U.S. 1 (a taxpayer's suit distinguished in *Doremus*) because of her allegations with regard to the violation of her convictions by the practice complained of. Cf. *Baker* v. *Carr*, U.S. (decided March 26, 1962) upholding standing of voters to sue for redress of asserted malapportionment of representation in a state legislature. See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, esp. pp. 1298-99 and comment on *Everson* and *Doremus*, pp. 1310-11. In any event, the mother's interest as a parent and her son's own interest appear to be clearly sufficient under *McCollum* v. *Board of* [fol. 44] *Education*, 333 U.S. 203, and *Zorach* v. *Clauson*, 343 U.S. 306, 309 (n. 4). Cf. *Board of Education* v. *Barnette*, 319 U.S. 624. See also *Engel* v. *Vitale*, 218 N.Y.S. 659, 10 N.Y.2d 174, in which none of the several opinions in the Court of Appeals of New York found, or even referred to, any want of standing on the part of the taxpayer-parents who brought suit to prevent the recital of the so called Regents' prayer in a New York public school.

The principal contention of the appellants on the merits is that the reading from the Bible (whichever version may be used) and or the recital of the Lord's Prayer in the public schools constitute violations of the provisions of the First Amendment, made applicable to the States under the Fourteenth Amendment (*Cantwell* v. *Connecticut*, 310 U.S. 296), which proscribe any "law respecting an establishment of religion, or prohibiting the free exercise thereof." The determination of the case depends upon the meaning and application of the Constitution of the United States.[2] On

[2] No question is raised under the Constitution of this State. See Article 36 of the Maryland Declaration of Rights. Cf. Article 37 and *Torcaso* v. *Watkins*, 367 U.S. 488.

such questions this Court accepts as binding the decisions of the Supreme Court of the United States, and this is, of course, recognized by the majority of this Court in this case as well as by those of us who dissent. The rule is stated here simply because it greatly narrows the matters pertinent to the decision of this case. It would be merely a fruitless exercise in legal history for us to present one more re-examination of the origins and meaning of the religious freedom provisions of the First Amendment, if, [fol. 45] as we think, the decisions of the Supreme Court conclude the question to be decided. In *Everson* v. *Board of Education*, *supra*, 330 U.S. at 15-16, Mr. Justice Black, writing for the majority, said in part:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

The dissents in that case did not challenge this interpretation of the coverage of the First Amendment as being too broad, but thought it was applied too narrowly to the facts of that case.

In *McCollum* v. *Board of Education*, 333 U.S. 203, the Supreme Court adhered to *Everson* and held invalid under

the First Amendment the Illinois "released time" program for religious education in the public schools of Champaign. Such instruction was given on school property and on school time by representatives of several different faiths. Students who did not wish to take such instruction were excused from attendance, but were required to pursue secular stud- [fol. 46] ies in some other part of the school building. Students released from secular studies were required to be present at the religious classes, and reports of their presence or absence were to be made to their secular teachers. There were present in *McCollum* both the use of tax-supported property for religious purposes and close co-operation between school authorities and the local religious council in promoting religious education. The majority opinion, written by Mr. Justice Black, stated, in part (333 U.S. at 209-10):

> "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment * * * as we interpreted it in *Everson* v. *Board of Education*, 330 U.S. 1."

Mr. Justice Frankfurter, who had dissented in *Everson*, filed an opinion in which Mr. Justice Jackson, Mr. Justice Rutledge, and Mr. Justice Burton, who had also dissented in *Everson*, joined, stating the view that the Illinois released time program there involved was invalid under the First Amendment. In it he said (333 U.S. at 213): "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" This view was recently reiterated by the Supreme Court in *Torcaso* v. *Watkins*, 367 U.S. 488, at 493-94, in reversing

[fol. 47] a judgment of this Court.[3] In *McCollum*, Mr. Justice Jackson filed a separate concurring opinion in which he expressed agreement with the opinion of Mr. Justice Frankfurter and also concurred in the result reached by the Court. He expressed some reservations. First, he questioned whether the facts of the case established jurisdiction in the Supreme Court, and second, he thought that the Supreme Court should place some bounds on the demands for interference with local schools which that Court is empowered or willing to entertain. Mr. Justice Reed alone dissented.

In *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, *appeal dismissed*, 342 U.S. 429, the New Jersey Supreme Court upheld a statute of that State providing for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. The Supreme Court of the United States dismissed an appeal from that judgment because of the lack of standing of the appellants to maintain the suit. One appellant was a parent of a child who had graduated, and the case was held moot with respect to that child. The claims of the appellants as taxpayers were held insubstantial and insufficient. Mr. Justice Douglas, with whom Mr. Justice Reed and Mr. Justice Burton agreed, dissented as to the latter holding and thought that the case should have been decided on the merits. The majority opinion intimated doubt as to whether [fol. 48] the allegations of the complaint showed injury to the child (who had by then graduated) while she was a student, pointing out that there was "no assertion that she was injured or even offended [by the Bible reading] or that she was compelled to accept, approve or confess any dogma or creed or even to listen when the Scriptures were read" and also that there was a stipulation that any child could be excused, at his or her parents' request, from the Bible reading and that no such request had been made. 342 U.S. at 432. The Supreme Court did not, however, rest its dismissal of the appeal of the parent of this child on any ground other than mootness.

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[3] The opinion was written by Mr. Justice Black and six of the other members of the Court joined in it. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the result.

In *Zorach* v. *Clauson*, *supra*, the New York "released time" program for religious education for public school students was upheld. Attendance was not compulsory and the religious instruction was not given in school buildings nor was any public expense involved. Students were released on written request of their parents to leave the school premises to receive religious instruction or join in devotional exercises at religious centers, and reports of their attendance were furnished to school authorities by the religious bodies. Students not released to attend religious instruction or observances were required to remain in their classrooms. In the opinion of the Court in *Zorach*, Mr. Justice Douglas made the often-repeated statement relied upon by the majority of this Court in this case and by this Court in *Torcaso* v. *Watkins*, 223 Md. 49, 162 A. 2d [fol. 49] 438, *reversed*, 367 U.S. 488, that "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. The Court held, over vigorous dissents by Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson, that there was no violation of the principle of separation of church and state and that under the New York released time plan "the public schools do no more than accommodate their schedules to a program of outside religious instruction." The Court then added: "We follow the *McCollum* case." *Id.* at 315.

Because of the different result in *Zorach* from that in *McCollum*, there was belief (shared by this Court in *Torcaso*) that *Zorach* marked a retraction from *McCollum*. Since the decision of *Torcaso* by the Supreme Court there can hardly be any basis for such a continued interpretation of *Zorach*. The "wall of separation" between church and state recognized by both the majority and the dissenters in *Everson*, and described as "high and impregnable" in *McCollum* (to which case the Court expressed its adherence in *Zorach*), remains as high and impregnable as ever under *Torcaso*. Cf. *McGowan* v. *Maryland*, 366 U.S. 420, and companion cases, *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582; and *Braunfeld* v. *Brown*, 366 U.S. 599.

There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of

[fol. 50] the Lord's Prayer are Christian religious exercises.[4] This being so, the inclusion of such a reading or recital in the opening exercises of the public schools seems plainly to favor one religion and to do so against other religions and against non-believers in any religion. This, I think, is directly contra to the prohibition against any "law respecting an establishment of religion," contained in the First Amendment, as that provision has been interpreted by the Supreme Court. See the *Everson*, *McCollum*, *Torcaso* and *McGowan* cases, all cited above. I find nothing inconsistent with the broad interpretation therein set forth in either *Doremus* or *Zorach*. I have already quoted from *Torcaso* as to the penetrating reach of the First Amendment. In *McGowan*, the Chief Justice said in the opinion of the Court (366 U.S. at 441-42): "But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a 'broad interpretation . . . in the light of its history and the evils it was designed forever to suppress.'" The Court then cited *Everson*, 330 U.S. at 14-15 and cited and briefly discussed *McCollum* as holding the religious instruction program there involved "to be contrary to the 'Establishment' Clause." The religious exercises here prescribed seem to me no less so. Here we are dealing not merely with released time, but [fol. 51] with a prescribed religious exercise conducted by public school officials in public schools of the State, attendance at which schools (with exceptions not here important) is required (Code, (1957), Art. 77, Sec. 231), during school time and in school buildings. Granting that the use of school buildings is not a determinative factor in distinguishing *McCollum* and *Zorach*, I think that, if present, it is a relevant factor in determining whether the State is lending its aid to promoting religion. There is, I think, a marked difference between an accommodation of the public school schedule to religious instruction and the inclusion of religious exercises in public school ceremonies.

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[4] If the exercises were confined to reading from the Old Testament, they would be both Jewish and Christian, but still religious

I think that here the State is lending its aid to religion and that *McCollum* is controlling.

The fact that individual students, or theoretically all students, may be excused from attendance at these exercises does not, in my estimation, save the rule from collision with the "establishment of religion" clause of the First Amendment, even if it could save it from collision with the "free exercise of religion" clause. The coercive or compulsive power of the State is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises.

This conclusion is in accord with the result reached by a special three-judge District Court in Pennsylvania in *Schempp* v. *School District of Abington Township*, F. Supp. , decided February 1, 1962. The opinion was written by Biggs, C. J., after remand of the case by the Supreme Court (364 U.S. 298) following the amendment of the Pennsylvania statute *pendente lite* so as to provide for pupils to be excused upon the written request [fol. 52] of a parent or guardian from attending the reading, without comment, of ten verses from the Bible, such reading still being made compulsory in public schools of that Commonwealth.

I have carefully considered the case of *Engel* v. *Vitale*, *supra*, 10 N.Y. 2d 174, 218 N.Y.S. 2d 579, in which five of the Judges of the Court of Appeals of New York concurred in upholding the reading in a public school of that State of the so called "Regents' Prayer". There, as in the instant case and in *Schempp*, there were provisions for students to be excused from the exercises at which the prayer was required to be said. I find the dissenting opinion of Judge Dye, in which Judge Fuld concurred, more persuasive than the majority views. The majority seems to me to do as this Court did in *Torcaso* in placing too much reliance on the result of *Zorach* and the oft-quoted statement that "We are a religious people whose institutions presuppose a Supreme Being." The opinion of Justice Dye interprets the decisions of the Supreme Court substantially as I have endeavored to do in this dissent.

Despite the provisions for excuse from attending these religious exercises, two further questions relating to coercion (apart from what might be called the general coercion already considered in connection with the "establishment of religion" clause) still remain. One is whether or not there is coercion upon the individual student by reason of his incurring suspicions and losing caste with his fellows, as alleged in the petition. The other is whether or not there [fol. 53] is compulsion upon the student or his parent requesting that he be excused, or upon both, to profess disbelief in any religion.

As to the first of these questions it seems to me that under our ordinary rules of pleading, the allegations of the petition are not so insubstantial as to be brushed aside as mere conclusions of the pleader, and that they are sufficient on demurrer. The Supreme Court has recognized in *Brown* v. *Board of Education*, 347 U.S. 483, in applying the Fourteenth Amendment, that psychological effects upon children may be of vital importance. Such factors are alleged here, and as the case now stands they are admitted by the demurrer.

With regard to the second question stated—requiring a profession of disbelief—the situation here seems to be the converse of *Torcaso*. There the Supreme Court struck down the provision of the Constitution of this State requiring as a condition of holding an office of public trust that the person elected or appointed thereto declare his belief in the existence of God. Here, since attendance at these religious exercises is compulsory, unless a written parental excuse is filed, what amounts to a profession of disbelief in the religion to which they pertain is required of the parent and perhaps also of the child, at the peril of the child being subjected to the pressure alleged or of the parent and the child, too, if he is old enough to comprehend and share his parents' views respecting religion, [fol. 54] subordinating or abandoning their convictions. Cf. *Talley* v. *California*, 362 U.S. 60, involving a freedom of speech question. Neither a profession of belief, nor of disbelief may be required.

These considerations illustrate the intermeshing of the "establishment of religion" and of the "free exercise"

clauses of the First Amendment. Hesitancy to expose a child to the suspicions of his fellows and to losing caste with them, will tend to cause the surrender of his and his parents' religious or non-religious convictions and will thus tend to put the hand of the State into the scales on the side of a particular religion, which is supported by the prescribed exercises. *Torcaso* quoted from *Everson* with regard to the meaning of the establishment clause; it also explicitly held that the provision which was there condemned "invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." Whether *Torcaso* proceeds on one or the other or both of the religious freedom provisions of the First Amendment, it seems clear under all of the cases, including *Zorach*, that coercion is barred.

Engel v. *Vitale*, *supra*, cert. granted 368 U.S. 924, was argued on April 3, 1962, and is now awaiting determination by the Supreme Court. I believe that its decision in that case will be determinative of this. Meanwhile, I can only state my understanding of the effect of prior decisions of the Supreme Court and express my own opinion that those decisions call for a decision of this case reaching a result [fol. 55] opposite to that reached by a majority of this Court.

Judge Henderson and Judge Prescott have authorized me to say that they join in this dissent.

[fol. 56]

IN THE COURT OF APPEALS OF MARYLAND

No. 90, September Term, 1961

WILLIAM J. MURRAY, III, Infant, etc., et al.,

v.

JOHN N. CURLETT et al. and BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

Appeal from the Superior Court of Baltimore City.

Filed: May 26, 1961.

December 20, 1961: Order of Court filed setting case for reargument during January session on constitutional question involved.

April 6, 1962: Judgment affirmed; appellants to pay the costs. Op. Horney, J. Brune, C.J. dissents and files dissenting opinion, in which Henderson and Prescott, J.J. concur.

DOCKET ENTRIES

STATEMENT OF COSTS:

In Circuit Court:

Record	$25.00
Stenographer's Costs	——

In Court of Appeals:

Filing Record on Appeal	$ 20.00
Printing Brief for Appellant	220.16
Reply Brief	
Portion of Record Extract—Appellant	
2 Appearance Fees—Appellant	20.00
Printing Brief for Appellee	234.55
Portion of Record Extract—Appellee	
2 Appearance Fees—Appellee	20.00

[fol. 57] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 58]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Maryland is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.